United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7306

To be argued by
LEWIS R. FRIEDMAN

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P/S

United States Court of Appeals

For the Second Circuit

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

against

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLENTS

PRELIMINARY STATEMENT

The United States District Court for the Southern District of New York (Cannella, J.), after fully considering the relevant facts and equities and affording both sides a full opportunity to submit both oral and written evidence and testimony, granted a preliminary injunction prohibiting the Agency for Child Development in the City of New York (A.C.D.) from defunding day care centers until plaintiffs and the plaintiff class (who are the

parents of the children attending those centers) are afforded a hearing. That grant of an injunction by the District Court should be affirmed because it was not a clear abuse of discretion. Indeed, it was an eminently reasonable exercise of discretion.

Plaintiffs' cross-appeal from the decision below only to the extent that the hearing ordered by Judge Cannella was not required to be a "fair hearing" pursuant to federal and state regulations, as clearly required by the applicable law. Plaintiffs ask that the order below be modified to require such "fair hearings."

On July 2, 1976, the municipal appellants moved for a stay of the District Court order. The motion was denied by Judge Mulligan and an expedited appeal scheduled.

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in granting a limited preliminary injunction after conducting a hearing at which all parties were given an opportunity to submit any evidence, written or oral, which they deemed relevant?

2. Should the District Court have ordered a "fair hearing" in accordance with federal and state regulations and the opinion of the Department of Health, Education and Welfare (interpreting its own regulations), which are dispositive of the issues at bar, without reaching any constitutional questions?

FACTS AND PROCEEDINGS BELOW

Day care services in New York City are funded under Title XX of the Social Security Act (42 U.S.C. §§1397 et seq.). Pursuant to the federal funding scheme, the federal government will participate in up to 75% of the expenditures for day care services provided by the state to eligible parents; New York State contributes 12.5% of the cost and New York City the remaining 12.5%. The Agency for Child Development of the City of New York (A.C.D.) is a division of the Human Resources Administration (H.R.A.) of the City of New York which administers day care services in New York City. The day care centers are non-profit corporations which are reimbursed for their expenses by A.C.D. on the basis of an annual budget.

On May 26, 1976, A.C.D. announced that as of July 1, 1976, Title XX funds would no longer be made available to 64 of the City's day care centers ("defunding"). Approximately 3,500 children were enrolled in those 64 day care centers on May 26. The plaintiffs in this action are the parents of these children.

Upon the public announcement of the defunding, numerous members of the plaintiff class (over 1,000) sent requests to the New York State Department of Social Services (D.S.S.), the state agency which administers Title XX funds (N.Y. Social Services Law §410) requesting a "fair hearing" pursuant to the state and federal regulations. The state never replied. No hearings of any sort were provided to the members of the plaintiff class.

As of the filing of the complaint (June 21, 1976), a survey of 3,054 members of the plaintiff class revealed that only 855 children, 28%, had been offered any placement in an alternative day care center (A. 18-20). Thus, by the filing of the complaint, approximately 72% of the members of the plaintiff class would have had their day care services terminated as of July 1, 1976. [An updated survey on June 28, 1976, showed that these figures remained almost unchanged (A.166-7, 180-2)].

Appellants never challenged these figures. Indeed, appellants never advised the court as to how many children had actually been offered alternative placement. Instead, appellants alleged -- without any documentary or other basis -- their expectation that 72% of the class "will" receive alternative placement by July 1, 1976 and that the remaining 28% would be placed by August 31, 1976 (A. 83).

Moreover, appellants did not even attempt to dispute plaintiffs' claim that such alternative facilities as were offered [regardless of the number of such offers] were wholly inadequate, and thus constituted a reduction in day care services to those members of the plaintiff class receiving alternative offers. The undisputed record below shows that the alternative facilities were either hopelessly overcrowded as a result of the proposed transfers or were so far from the plaintiffs' homes as to be inaccessible (19-20, 41-45, 183-4).

The Department of Health, Education and Welfare (H.E.W.) rendered a written opinion on June 17, 1976 (A. 15-16) that plaintiffs were entitled to a "fair hearing" as provided in 45 C.F.R. 228.14 and 205.10; H.E.W. also expressed the opinion that pending the holding of such fair hearings, day care services to the plaintiffs shall not be "suspended, reduced, discontinued or terminated . . . until a hearing is rendered" (A. 15).

On June 7, 1976, the Department of Health, Education and Welfare ("H.E.W.") warned D.S.S., a defendant below but not an appellant at bar, that such fair hearings were required (see A. 16). At the hearing on the motion for a preliminary injunction, D.S.S. did not deny that the plaintiff class was entitled to "fair hearings", and indeed, submitted no papers whatsoever in opposition.

On June 9, 1976, apparently in response to the H.E.W. June 7, 1976 letter, D.S.S. issued an Administrative Letter, No. 76 ADM-56 (A. 171-3) which provided that where a local agency (such as A.C.D.) decides "because of fiscal pressures, [to] curtail the services which they have included in their current Title XX local plan", such agency must provide a "fair hearing" to any affected recipients.

On June 17, 1976 (A. 15-16) H.E.W. rendered a written opinion that plaintiffs were entitled to a "fair hearing" as provided in 45 C.F.R. 228.14 and 205.10; H.E.W. also expressly stated that pending the holding of such fair hearings, day care

services to the plaintiffs shall not be "suspended, reduced, discontinued or terminated . . . until a hearing is rendered (A. 15).

The decision by A.C.D. to "defund" the centers attended by the children of the plaintiff class was allegedly based upon the application of certain financial and other facts to various criteria intended to identify those centers which were least cost effective or which provided the least services to recipients (A. 79-80). The plaintiffs have never disputed the criteria themselves; nor have plaintiffs disputed the necessity for A.C.D. to pare its budget due to the fiscal crisis (A. 168-9). Rather, the plaintiffs dispute the accuracy of the facts and figures allegedly relied upon by A.C.D. and challenge the application of those facts to A.C.D.'s decision to defund the allegedly least efficient centers. (See, e.g., A. 169, 185-86). For example, A.C.D. claims that it defunded Chelsea Children's Center (the center attended by the children of plaintiff Pamela Schneider) because Chelsea Children's Center has a per capita/per week cost of $91 (A. 108). Plaintiff Schneider, on the other hand, contends that the per capita/per week cost is only $63 per week, nearly 50% below A.C.D.'s figure (A. 186).

Similarly, A.C.D. purported to base its decision to defund on the availability of alternative facilities for children currently enrolled at the defunded centers, and claims that "A.C.D. has made no decision to discontinue, suspend or reduce the services to any children [at the defunded centers]. On the contrary,

A.C.D. is offering transfers to children at other facilities." (A. 81-2). As noted above, plaintiffs disputed this claim, and contend that only 28% of their number have been offered any alternative facilities; plaintiffs also claim that such alternative facilities as were offered are inadequate, being either overcrowded or at an impracticable distance from their homes (A. 19-20).

Moreover, although A.C.D. has supplied the figures it relies upon with respect to the cost efficiency of some of the centers attended by plaintiffs' children (A. 102-113), it has never supplied the figures which were used in comparing plaintiffs' centers with other non-defunded centers.

The termination of day care services as of July 1, 1976 would result in irreparable hardships to members of the plaintiff class. The record shows that day care parents are: (a) single parents who must work to support their children -- these parents will be forced to quit work and accept welfare if they lose day care; (b) parents who are disabled and unable to work or care for their children -- many of these parents will be forced to place their children in foster homes; (c) parents on welfare who are seeking employment in order to become self-supporting; (d) parents enrolled in schools or other training programs; and (e) parents with emotionally disturbed or handicapped children who need specialized care for their children but are unable to afford it privately (A. 12, A. 39-48).

After their unsuccessful attempts to obtain hearings on request, plaintiffs commenced this action on June 21, 1976 (A. 55-76), and immediately moved for a preliminary injunction pursuant to Rule 65, Fed. R. Civ. P., and for class certification pursuant to Rule 23 Fed. R. Civ. P. (A. 2-3).

The District Court, in a memorandum order and decision dated June 30, 1976 granted plaintiffs' motion for class certification and their motion for a preliminary injunction to the extent that the municipal appellants were ordered to continue funding plaintiffs' centers until plaintiffs had been given the opportunity to have "some kind of input" into the defunding decisions. The District Court based its decision on the plaintiff class' constitutional right to due process prior to defunding.

The District Court declined to grant plaintiffs a "fair hearing" pursuant to federal and state regulations and the opinion of H.E.W. prior to the defunding.

In granting the class action motion, the court certified, pursuant to Fed. R. Civ. P. 23(b)(2), that the action should proceed as a class action.

Contrary to the suggestion in appellants' brief (Br. 22), the District Court did not decide appellants' cross-motion to dismiss, so that that motion is not before this court on appeal.

Following the issuance of the memorandum order and decision, but prior to the signing of the District Court's implementing order (A. 210-12), the municipal appellants moved for reargument

and reconsideration. The municipal appellants proffered live testimony by Lew Frankfort, the interim Executive Director of A.C.D., who made the same arguments regarding the alleged equities that appear at pages 21-22 of appellants' brief to this court. After hearing Mr. Frankfort's testimony, Judge Cannella found Mr. Frankfort's testimony unpersuasive and adhered to his original decision. Inexplicably, appellants have failed to include the transcript of Mr. Frankfort's testimony and Judge Cannella's comments with respect thereto in the record on appeal filed in this court.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION.

The question raised on appellant's appeal is whether the District Court abused its discretion in granting a preliminary injunction. American Federation of Musicians v. Stein, 213 F. 2d 679, 683 (6th Cir. 1954) cert. denied 348 U.S. 873 (1954); Packard Instrument Co. v. ANS Inc., 416 F. 2d 943, 945 (2d Cir. 1969). The District Court here, in exercising its discretion, properly applied (A. 192-3) the standard that in order to prevail on a motion for preliminary injunction the party "must either demonstrate a combination of probable success on the merits and the possibility of irreparable injury or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships tips 'decidedly' in his favor." Brown and Williamson Tobacco Corp. v. Engman, 527 F. 2d 1115, 1121 (2d Cir. 1975). Applying each branch of that test to the instant case, the district judge found that the plaintiffs had established grounds for a preliminary injunction.

The District Court reasonably concluded that the plaintiffs had established probable success on the merits of their claim.*

Judge Cannella correctly decided the constitutional issue. Caramico v. Secretary of H.U.D., 509 F. 2d 694 (2d Cir. 1974); Burr v. New Rochelle Municipal Housing Authority, 479 F. 2d 1165 (2d Cir. 1973). Surely, children who are recipients of federally funded day care services (i.e. the plaintiff class at bar) are entitled to at least the same due process as residents in federally funded housing projects (i.e. the plaintiffs in Burr and Caramico). As both Burr and Caramico indicate, whether plaintiffs have a "statutory entitlement" to governmental services is of no consequence. Once plaintiffs are provided with such services, they have (to paraphrase Caramico, at p. 701) a "protectable interest in continued [day care services]."

However, this Court need not decide the constitutional questions raised below. They are now either moot or, as a practical

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*Clearly, the District Court had subject matter jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) over the claims by the plaintiffs, recipients of welfare or day care services, that they were constitutionally entitled to hearings prior to the termination of such services. Goldberg v. Kelly, 397 U.S. 254 (1970); Almenares v. Wyman, 453 F. 2d 1075, 1982-3 (2d Cir. 1971) cert. denied 405 U.S. 944 (1972); Gasaway v. McMurray, 356 F. Sup. 1194, 1197 (S.D.N.Y. 1973). And, of course, once jurisdiction is established under 28 U.S.C. §1343, the court properly had jurisdiction over the pendent state and federal statutory claims that the "fair hearing" requirements of the Social Security Act, federal regulations and state regulations had been violated. See Gasaway v. McMurray, supra at 1197; Almenares v. Wyman, supra; United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

matter, academic. A.C.D. has now purported to hold the hearings ordered by Judge Cannella.

In any event, as shown in Point II, infra, the plaintiffs were deprived of their rights pursuant to the state and federal regulations which require a "fair hearing" prior to the suspension, reduction, discontinuance or termination of day care facilities. If the plaintiffs are correct on that claim, pursuant to Hagans v. Lavine, 415 U.S. 528 (1974), the court should have granted its preliminary injunction and required that the city officials comply with the "fair hearing" requirements of state and federal regulations and statutes. The District Court's conclusion that the plaintiffs had established "probable success on the merits" is correct.

Also, there can be little doubt that the plaintiffs established irreparable harm. If funding for plaintiffs' day care centers was withheld on July 1, 1976, the following would have immediately occurred: (a) working parents of children in the defunded centers will be forced to leave their jobs or abandon vocational training and education to care for their children and will be required to apply for welfare in order to subsist; (b) children will be abruptly cut off from the vital educational, social and psychological opportunities day care is intended to provide; (c) the centers will lose their lease and their staff;

once shut down they will be unable to reopen. Such harm would obviously be irreparable. It is for these reasons that other District Court judges have found irreparable injury in the context of day care facilities. See Gasaway v. McMurray, supra; Glover v. McMurray, 361 F. 2d 253 (S.D.N.Y. 1973) reversed 487 F. 2d 403 (2d Cir. 1973) vacated 417 U.S. 963 (1974), on remand 507 F. 2d 1194 (2d Cir. 1974); Ayers v. Whaley, 76 Civ. 1499 (S.D.N.Y. Knapp, J.).

Also, the second branch of the preliminary injunction test is met. For, in any event, as noted above and in Point II, infra, certainly the plaintiffs established a serious question going to the merits of the case. Hamilton Watch Co. v. Benrus Watch, 278 F. 2d 738, 742 (2d Cir. 1953).

The District Court also reasonably concluded that the balance of equities tips "decidedly" in plaintiffs' favor. Contrasted with the serious and irreparable injury threatened to plaintiffs, the sole potential injury to defendants would be to prolong for a brief period funding levels currently in effect. However, A.C.D. has only itself to blame for such harm. Plaintiffs requested fair hearings early in June 1976; the hearings could have been held prior to July 1. Defendants, having elected to deny plaintiffs their constitutional and statutory rights at a time when it would not have required an injunction, should not now be heard to complain of costs they will incur solely because of their own unlawful delay (A. 207-8).

The cases cited by municipal appellants are not in point, and, in any event, do not establish that Judge Cannella abused his discretion.

Windham v. City of New York, 405 F. Supp. 872 (S.D.N.Y. 1976) did not involve federally funded day care centers (see p. 873). Moreover, there, unlike the case at bar, the plaintiffs conceded that all the children were receiving adequate alternative placement. Likewise, a review of the papers submitted in Windham shows that the plaintiffs there did not brief the constitutional and statutory issues. In any event, Judge Cannella correctly declined, in the reasonable exercise of his discretion, to follow the dicta in Windham "on the instant record" (A. 203).

Appellants' statement of the facts and holding in Our Children's Day Care Center v. Whaley, 52 A.D. 2d ___, 382 N.Y.S. 2d 817 (2d Dept 1976) is plainly wrong. Although appellants claim (Br. 16) that Our Children upheld the defunding of a day care center without first granting the parents a hearing, the fact is that the court there expressly noted that "the real parties in interest, the parents of [the] children [attending the center], have apparently chosen not to be parties to this proceeding" (at p. 817). In addition, as in Windham and unlike the instant case, the children in Our Children had all been given an alternative placement.

In short, the District Court, weighing the matter before it, properly exercised its discretion to grant a preliminary injunction.

POINT II

THE PLAINTIFFS ARE ENTITLED TO THE "FAIR HEARING" MANDATED BY APPLICABLE STATE AND FEDERAL STATUTES AND REGULATIONS PRIOR TO THE DEFUNDINGS PROPOSED BY THE MUNICIPAL DEFENDANTS.

The plaintiffs are cross-appealing from the order below insofar as it failed to grant them the "fair hearing" which is required by federal and state statutes and regulations. In an opinion letter submitted to the District Court (A. 15-16), the Department of Health, Education and Welfare (H.E.W.) expressly found that the plaintiffs at bar have "an unqualified right" to such a "fair hearing" prior to defunding of the center.

In particular, the plaintiffs should have been granted a hearing at which there would be: (a) a review by the New York State Department of Social Services ("D.S.S.") of the decision of the determination by local A.C.D. officials; (b) a hearing before an impartial hearing examiner who is not responsible or beholden to the municipal appellants; (c) a statement by A.C.D. of the reasons and alleged factual basis for its decisions; (d) access to all documents upon which A.C.D. allegedly relied in reaching its decision; (e) the right to confrontation and cross-examination of the A.C.D. officials who made the decision. Although he ordered a hearing, Judge Cannella expressly declined (A. 203-7) to order that it include these essential and mandatory safeguards.

The District Court correctly recognized that the pendent claim that the practices here violated the federal statutes and regulations should be considered first if "dispositive" [Hagans v. Lavine, 415 U.S. 528, 543, 547 N. 12 (1974)]. However, the District Court incorrectly concluded that the plaintiffs pendent claims were not "dispositive".

Pursuant to Title XX of the Social Security Act [42 U.S.C. §§1397 et seq.], regulations of H.E.W. require that parents be afforded a "fair hearing" if a day care recipient is subject to "denial, reduction or termination of day care services".

45 C.F.R. §228.14 makes applicable to recipients of day care services the requirements of 45 C.F.R. §205.10 which specifically applies to welfare recipients. The regulation requires that "in cases of intended action to discontinue, terminate, suspend or reduce assistance" the state is required to give adequate notice and to provide for a hearing "conducted by an impartial official or designee of the agency" and that the claimant have opportunity to examine the contents of the case file and documents before the agency prior to the hearing, to present his case, to bring witnesses, to establish facts, to advance arguments and to confront and cross-examine adverse witnesses. See 45 C.F.R. 205.10(a)(4), (9), (13). Also, pursuant to those regulations, D.S.S. has adopted its own fair hearing requirements [18 N.Y.C.R.R. Part 358] which mandate fair hearings for "recipients of child welfare services, on the

following grounds. . .(2) discontinuance of any such service; . . .(4) a determination which failed to take account the recipients choice of service program". 18 N.Y.C.R.R. §358.4(b). Where the state regulations require a hearing, the state procedures generally track the federal regulations [18 N.Y.C.R.R. §358.16].

H.E.W., the agency which wrote and administers the regulations in question, has expressly interpreted them in this very action. H.E.W. has ruled that the plaintiff class i.e., "parents whose children attend day care centers whose funding is scheduled to be terminated as of July 1, 1976 by the New York City Agency for Child Development" (A. 15) have "an unqualified right to a fair hearing. . .if the action of the Agency for Child Development results in a discontinuance, suspension, reduction, or termination of the day care service which the family has been receiving as an eligible recipient in the Title XX program." And, in specifically outlining the situations in which appropriate notice and "fair hearings" are required, H.E.W. also specified situations in which "alternative services are at a distance from the parents home such as to effectively preclude the parent from utilizing such service" or where "the parent alleges in good faith that such alternative services constitute a reduction in services from those currently provided". Thus, even in those situations in which the municipal appellants have provided alternative services, clearly it is the opinion of

H.E.W. that a "fair hearing" is still required. As this court has recently noted, "the position of H.E.W., as the federal administrative agency responsible for enforcing the provisions of the federal statute in a highly complex and technical area, seems to us particularly significant". McGraw v. Berger, __ F. 2d ___, slip op. 4741, 4753 (2d Cir. July 2, 1976); Hagans v. Wyman, 399 F. Supp. 421 (E.D.N.Y. 1975); see Rosado v. Wyman, 397 U.S. 396 46 (1971). Indeed, the United States Supreme Court has stated that the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations". Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 276 (1969); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Surely, the H.E.W. interpretation in this case is not clearly erroneous.

The sole excuse tendered by municipal appellants for ignoring these regulations is that the City (which supplies only 12.5% of the funding involved) is in the midst of a fiscal crisis requiring budget cuts. At bar, the proposed "defunding" of the day care centers requires a "fair hearing" nevertheless. On June 9, 1976, D.S.S., the state agency charged with administration of the state regulations sent Administrative Letter 76 A.D.M.-56 (reproduced in the appendix at A. 171-73) to local commissioners of social services (apparently including the defendant Whaley) setting forth instructions for those agencies

which "must because of fiscal pressures, curtail the services which they have included in their Title XX local plan . . . " The administrative letter specifically requires that "fair hearings" be held, irrespective of the reason why day care services are being terminated, including terminations due to fiscal crises. Despite its administrative letter, D.S.S. has not responded to the numerous requests by the plaintiff for fair hearings at bar. D.S.S. (a non-appealing defendant) did not submit papers below and has not offered any reasons for its failure to follow its own written guidelines.

The District Court below did not pass upon the plaintiffs' right to a "fair hearing". The court noted that even if a "fair hearing" were required under the facts at bar, plaintiffs would not be entitled to such a hearing prior to defunding. Judge Cannella cited a federal regulation [45 C.F.R. 205.10(a)(6)(A)] not cited or relied upon by municipal appellants below and therefore not briefed below by either side, which allow defundings prior to completion of hearings where "the sole issue is one of state or federal laws or policy" and concluded that, in his opinion, the sole issue presented by the proposed defundings at bar were "policy" issues. In this respect, Judge Cannella erred.

The issues raised here are not questions of state or federal law or policy. What is involved here is, at most, local as opposed to federal or state policy. H.E.W. could

have drafted its regulation to apply to such local policies, and presumably would have done so if it intended them to be covered by the regulation. But it did not do so. Indeed, the H.E.W. opinion letter states that the services "shall not be suspended, reduced, discontinued or terminated" (A. 15) prior to the hearing and makes no reference to the "policy" exception. Likewise, the state regulation which permits pre-hearing defunding, 18 N.Y.C.R.R. 358.8(c)(1), refers only to questions of "state policy (including law and department regulations)" and does not mention local policies.

Moreover, the decision to terminate day care services for the particular members of the plaintiff class was not a "policy" determination at all. The only "policy" determination which A.C.D. has made is that it would defund centers which showed the lowest productivity according to a number of established criteria (A. 79-80). Plaintiffs did not below and do not now challenge these criteria; nor do plaintiffs challenge the necessity to pare A.C.D.'s budget by a stipulated amount (A. 168). Rather, plaintiffs contend that they are entitled to notice of the facts on which A.C.D. relied in determining that their particular center "qualified" for defunding under these criteria and the right to challenge the accuracy of these facts at a hearing. Thus, it is the application of facts to policy, not the policy

itself, which the plaintiffs challenge.* Significantly, the State regulations expressly preclude pre-determination defunding where the issue is "whether the state policies (including law and department regulations) were correctly applied to the facts of the particular case". [18 N.Y.C.R.R. §358.8(c)(1)].

Indeed, even Judge Cannella acknowledged that the decision of A.C.D. to defund the centers attended by the plaintiff class's children were "premised upon adjudicative facts" not "legislative facts" (A. 203-4). We agree. The regulations require that plaintiffs be given the opportunity to adjudicate these "adjudicative facts" at a fair hearing.

Municipal appellants concede that the plaintiff class is entitled to "fair hearings" under the regulations if they "are unhappy with the alternative facility" provided for their children by A.C.D. (Br., p. 17). However, the regulations specifically provide for fair hearings "in cases of intended action" (emphasis added), not merely after the action has already been taken. See 45 C.F.R. §205.10(a)(4).

Judge Cannella declined to order A.C.D. to "present any evidence or produce its officials for questioning" (A. 208).

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*This dichotomy between "policy" and "application to the facts" is frequently encountered in eligibility cases. In such cases, the state's policy decision to set eligibility at a particular income level may not be challenged at a fair hearing. The recipient is, however, entitled to challenge facts relied upon by A.C.D. in determining that she is not eligible.

Judge Cannella's rationale was that A.C.D.'s "decision, and the basis therefor, is amply laid out in the papers submitted" to the District Court (A. 208).

The record does not support this latter finding. The only documents submitted by municipal appellants relating to A.C.D.'s decision to defund were Exhibits A, C-1, C-2, D and I (reproduced in the record at A. 86-89, A. 102-33, A. 150-56). These exhibits purported to show the criteria used in selecting which centers would be defunded. However, they contained no figures or information regarding those centers not to be defunded -- thus making it impossible for the plaintiff class to know how and to what extent their center allegedly measured up in comparison to the non-defunded centers. To date, this information has never been provided by A.C.D.

However, the plaintiffs have a right to test and inquire into the facts allegedly set forth in the documents and the procedures used by A.C.D. to derive those facts and apply them at bar. Such can only be accomplished by holding a plenary hearing by an independent agency before an impartial hearing examiner at which the plaintiff class is afforded an opportunity to confront and examine the A.C.D. persons involved. That is precisely what Goldberg v. Kelly, 397 U.S. 254 (1970), and the regulations (which expressly incorporate Goldberg) mandate and why they mandate such a hearing. As the Supreme Court stated in Goldberg (at p. 268 of 397 U.S.):

> "The fundamental requisite of due process of law is the opportunity to be heard." [Citation omitted]. The hearing must be "at a meaningful time and in a meaningful manner." [Citation omitted]. In the present context these principles require that a recipient have timely and adequate notice detailing the reason for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. [emphasis added].

The form of hearing ordered by Judge Cannella failed to satisfy this test in several material respects, in addition to those noted above. At such a hearing, the plaintiffs would be powerless to prevent the following from occurring: A.C.D. could designate as hearing officers subordinate employees of A.C.D. who are answerable to those at A.C.D. who made the original decisions, and whose salaries and future prospects are dependent upon the ability of A.C.D. to reduce unilaterally its non-administrative staff budget. The hearings would have to be held without any guidelines since A.C.D. has no hearing rules or procedures. A.C.D. could arbitrarily impose inadequate time limitations and other procedural obstacles which would impede the plaintiff class from fully presenting their evidence. For example, several simultaneous, non-stop hearings could be scheduled to run from 8:00 a.m. through the day and night and around the

clock at inaccessible locations with fixed time schedules for each particular day care center.* Such procedures would be unconscionable in any case, but are clearly inappropriate where the plaintiff class consists of parents of young (primarily pre-school) children who by A.C.D.'s own definition are financially unable to retain baby sitting services.

The federal and state fair hearing regulations referred to above were designed to prevent precisely this type of summary depravation of the plaintiffs' right to be heard prior to the reduction, suspension or termination of federally funded day care services. H.E.W. correctly concluded that the plaintiffs' right to a hearing under the regulations was and is "unqualified". The court should have followed the guidance of H.E.W. and ordered the "fair hearing" required by the regulations. This would have avoided a possibly complex constitutional adjudication and afforded a fair and orderly procedure for the resolution of the rights and interest of all parties.

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*In fact, all of this is what happened at the hearings held by A.C.D. on July 13, 1976 (into the early morning hours of July 14) pursuant to Judge Cannella's order. (See brief of municipal appellants at p. 12)

CONCLUSION

THE ORDER APPEALED FROM AND THE GRANT OF INJUNCTION SHOULD BE AFFIRMED, EXCEPT THAT THE ORDER SHOULD BE MODIFIED TO PROVIDE THAT THE INJUNCTION WILL CONTINUE UNTIL DEFENDANTS HOLD FAIR HEARINGS PURSUANT TO THE STATE AND FEDERAL REGULATIONS AND RENDER THEIR DECISION IN ACCORDANCE WITH THOSE REGULATIONS.

Respectfully submitted,

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Service of 3 copies of the within Brief is hereby admitted this 16th day of July 1976

Signed _____

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Attorney General
R P

Service of 3 copies of the within Brief is hereby admitted this 16th day of July 1976

Signed _____

Attorney for _____

THREE COPIES OF THE WITHIN PAPER HAVE THIS DAY BEEN RECEIVED AT THE OFFICE OF THE CORPORATION COUNSEL

July 16, 1976

CORPORATION COUNSEL